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No. 87-1748

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

NEWSDAY, INC.,

Petitioner,

—against—

ROBERT J. SISE, as Chief Administrative Judge of the Office
of Court Administration of the State of New York, and
THOMAS HENNESSEY, as the Commissioner of Jurors of
the County of Suffolk,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK**

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May 20, 1988

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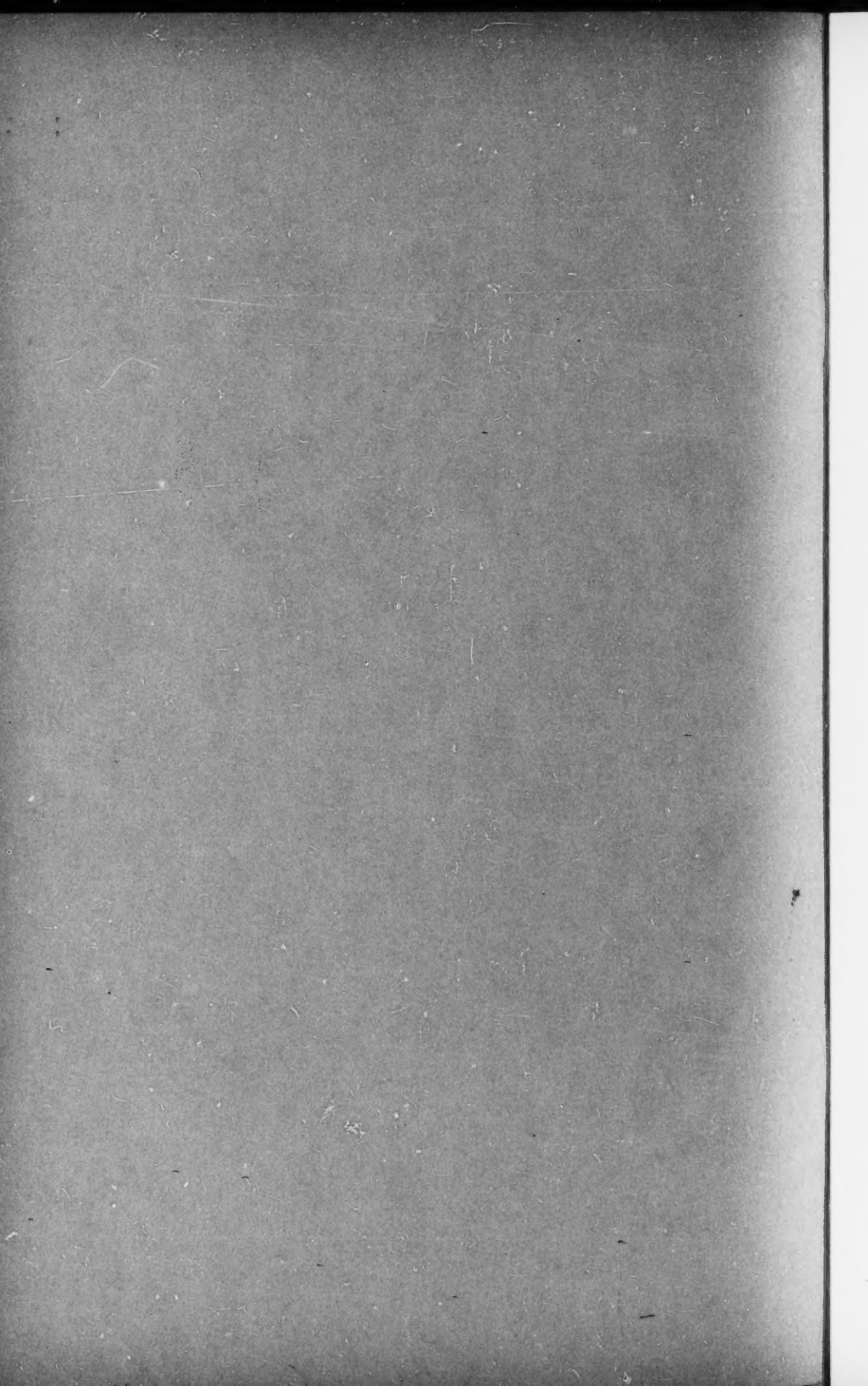


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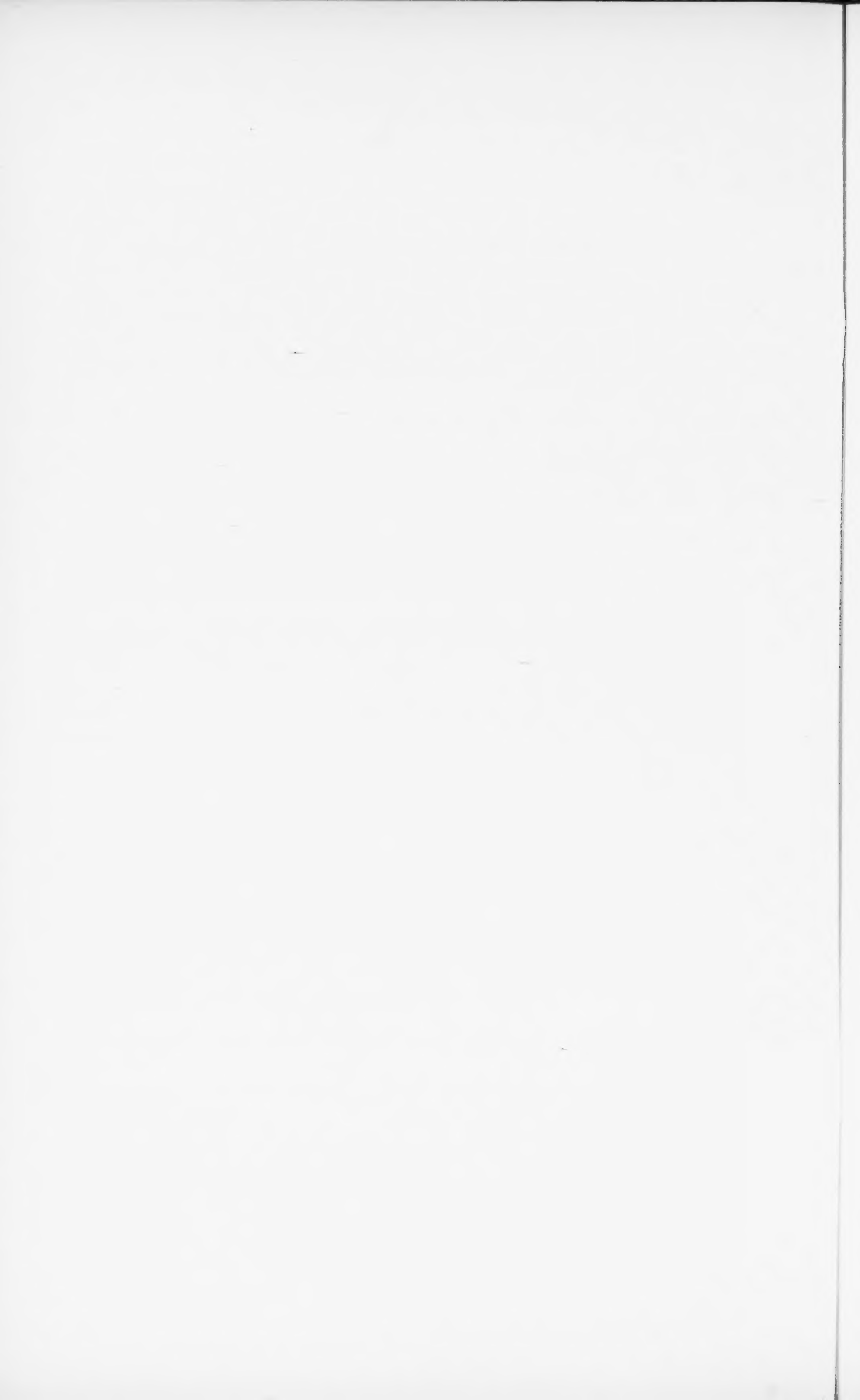
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STATEMENT OF THE CASE

This proceeding involves a petition for a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, dated December 23, 1987, which affirmed an order of the New York State Supreme Court, Appellate Division, Second Department, dated October 20, 1986. The Appellate Division's order had affirmed a judgment of the New York State Supreme Court, Suffolk County, dated February 19, 1985, which dismissed a petition for a judgment directing respondents to grant petitioner access to jurors' names and home addresses, without prejudice to petitioner's right to apply to the Appellate Division for such access pursuant to section 509(a) of the New York Judiciary Law.

Petitioner claims that certiorari should be granted because the New York Court of Appeals' ruling has violated its alleged First Amendment right of access to jurors' names and home addresses. Respondents assert that no constitutional question of substance is raised by the Court of Appeals' decision, because that decision did not determine petitioner's ultimate entitlement to jurors' names and home addresses under the First Amendment or otherwise, but only held that petitioner must comply with the procedure provided by New York law for obtaining access to juror information.

FACTS

In July of 1984, petitioner asked respondent Hennessey, the Suffolk County Commissioner of Jurors, for the names and home addresses of jurors who sat on the case of *People v. Patterson*, which ended in a mistrial. Respondent declined to release such information on the ground that its disclosure is governed by section 509(a) of the New York Judiciary Law, which provides that juror questionnaires and records are confidential and may not be disclosed except as permitted by the Appellate Division of the New York State Supreme Court¹.

1 Section 509(a) of the New York Judiciary Law reads as follows:

The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. The commissioner of jurors may also consider other information including information obtained from public agencies concerning previous criminal convictions. A record of the persons who are found not qualified or disqualified or who are exempted or excused, and the reasons therefor, shall be maintained by the commissioner of jurors. The county jury board shall have the power to review any determination of the commissioner as to qualifications, disqualifications, exemptions and excuses. Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division.

Petitioner then brought a proceeding in the trial-level New York State Supreme Court to compel respondents to disclose to it the names and home addresses of the *Patterson* jurors. Petitioner claimed that it was entitled to this information under New York's Freedom of Information Law (N.Y. Pub. Off. Law, § 84, *et seq.*), the common law right of access to judicial records and the First Amendment right of access to criminal trials. Respondents argued in opposition that the confidentiality provisions of section 509(a) of the Judiciary Law extend to all records used in or generated by the juror selection process, including records of jurors' names and home addresses that are derived from confidential juror questionnaires. Respondent asserted that because the records sought by petitioner are protected by section 509(a), they fall within the statutory exemption exception to the disclosure requirements of the Freedom of Information Law (N.Y. Pub. Off. Law, § 87(2)(a)).

The New York Supreme Court agreed with respondents' construction of section 509(a). Observing that "[t]he Legislature has provided a statutory forum for a review of the request for the information sought herein by way of an application to the Appellate Division [which] has been given exclusive authority to resolve the issues raised in the papers herein,"² the Supreme Court dismissed the petition without prejudice to its renewal before the Appellate Division. The Supreme Court did not pass on petitioner's common law or constitutional claims.

The New York Supreme Court, Appellate Division, Second Department, affirmed the Supreme Court's holding that jurors' names and home addresses are protected by section 509(a) and therefore are exempt from disclosure under the Freedom of Information Law. The Court held that pursuant to section 509(a), "the limited circumstances when information about a prospective juror may be disclosed and to whom it may be disclosed, rests in the sound discretion of the Appellate Division. For this reason, the proper procedure for obtaining access to information contained in juror records is by way of application to the

2 Appendix D to the Petition for a Writ of Certiorari (hereinafter referred to as "Petition"), at 20a.

Appellate Division.” *Newsday, Inc. v. Sise*, 120 A.D.2d 8, 12-13, 507 N.Y.S.2d 182, 184 (2d Dept. 1986) (citations omitted).

The Appellate Division noted that there are legitimate policy concerns underlying the statutory proscription against disclosure of juror information:

The requirement of confidentiality of Judiciary Law § 509(a) operates to protect the interests of prospective jurors by prohibiting unrestricted disclosure of these records, and, by necessary implication, of the information contained in these records or derived therefrom. The questionnaires and other related records contain many details of a juror’s private life. By requiring that the information remain confidential, the statute encourages truthfulness in responses by prospective jurors, shields them from possible harassment and intimidation, protects them from unwarranted invasions of privacy, prevents retribution and, generally, enables jurors to discharge their solemn civic duty to pass fairly upon the matters which they are entrusted to decide. The integrity of our jury system is, in large part, dependent upon the vitality of these principles and the promotion of these laudatory objectives.

120 A.D.2d at 13, 507 N.Y.S.2d at 184-185 (citations omitted).

While not dealing directly with petitioner’s constitutional claim, the Appellate Division found that the alternative means for obtaining disclosure of juror information explicitly sanctioned by section 509(a) assures that “the public interest in disclosure can be fully satisfied without risk to the public interest in nondisclosure.” 120 A.D.2d at 13-14, 507 N.Y.S.2d at 185. The Court noted that its decision in no way precluded petitioner from making a direct application to the Appellate Division pursuant to section 509(a) for the information sought and expressed no opinion whether such an application would be granted. 120 A.D.2d at 15, 507 N.Y.S.2d at 186.

The New York Court of Appeals affirmed the Appellate Division’s order. Stating that “[t]he issue here is whether records containing the names and addresses of jurors . . . are within

the exemption from disclosure under Judiciary Law § 509(a)' and that "the question before us involves only the interpretation of Judiciary Law § 509(a) and the reach of its provision for confidentiality," the Court construed section 509(a) as shielding from disclosure not only juror qualification questionnaires but also those portions of other records containing information obtained from the questionnaires. *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 149, 151-152, 524 N.Y.S.2d 35, 36, 38, 518 N.E.2d 930, 931-933 (1987).

One of the arguments advanced by petitioner to the Court of Appeals in support of its construction of section 509(a) was that release of jurors' names and home addresses would not threaten jurors' safety or privacy interests. The Court observed that this argument was irrelevant to the issue before it, saying:

In enacting Judiciary Law § 509(a), the Legislature exempted *all* information contained in the questionnaires regardless of its nature and the possible effect on privacy or safety interests which disclosure might cause. The Legislature has permitted an application for a court order, upon a proper showing, that particular information contained in the questionnaires should be made public. To what extent disclosure of specified information might affect jurors' privacy and safety interests is a factor that the court must balance against the interests favoring disclosure in determining whether to grant a Judiciary Law § 509(a) application. Such considerations, however, are not relevant to the legal questions here: the interpretation of Judiciary Law § 509(a) and the meaning and effect to be given its confidentiality provision.

71 N.Y.2d at 152-153, 524 N.Y.S.2d at 38-39, 518 N.E.2d at 933 (citations omitted).

The only discussion of petitioner's constitutional claim is found in footnote four to the Court of Appeals' decision, which states:

We also reject petitioner's assertion that it is entitled to the jurors' names and addresses under the public's consti-

tutional right of access to criminal proceedings and under the common-law right of access to judicial records. Inasmuch as petitioner has not contended that it has been denied access to any judicial proceedings or to any transcripts of any proceedings, petitioner's constitutional right of access has not been violated (*see, Matter of Herald Co. v Roy*, 107 AD2d 515, 517; *United States v Beckham*, 789 F2d 401, 406-409 [6th Cir.]; *United States v Yonkers Bd. of Educ.*, 747 F2d 111, 112-114 [2nd Cir.]; *cf., Matter of Associated Press v Bell*, 70 NY2d 32; *Press-Enterprise Co. v Superior Ct.*, 464 US 501). In addition, petitioner has no common-law right of access where records, such as these, have not been entered into evidence or filed in court and are, therefore, not public judicial records (*see, United States v Beckham, supra*; *United States v Gurney*, 558 F2d 1202 [5th Cir.]; *cf., Bank of Am. Natl. Trust & Sav. Assn. v. Hotel Rittenhouse Assocs.*, 800 F2d 339, 343 [3d Cir.]).

71 N.Y.2d at 153, n. 4, 524 N.Y.S.2d at 39, n. 4, 518 N.E.2d at 933, n. 4.

ARGUMENT

I.

NO SUBSTANTIAL CONSTITUTIONAL ISSUE IS RAISED BY THE NEW YORK COURT OF APPEALS' HOLDING THAT PETITIONER IS REQUIRED TO COMPLY WITH THE PROCEDURE PROVIDED BY NEW YORK LAW FOR OBTAINING ACCESS TO JUROR INFORMATION

Petitioner argues that certiorari should be granted to review the New York Court of Appeals' "summary elimination of the First Amendment right as a factor to be determined" in balancing the interests favoring and opposing a right of access to jurors' names and home addresses (Petition, at 18). This characterization of the Court of Appeals' decision is absurd. As repeatedly stated by that Court, the sole question for its consideration was whether the confidentiality provisions of section 509(a) apply to jurors' names and home addresses. 71 N.Y.2d

at 151-153, 524 N.Y.S.2d at 36-38, 518 N.E.2d at 931-932. The Court expressly declined to engage in a First Amendment-type balancing of the interests favoring and opposing disclosure of the information sought by petitioner, noting that these factors must be weighed in determining whether to grant a section 509(a) application, but were not relevant to the legal issue before the Court of Appeals. 71 N.Y.2d at 152-153, 524 N.Y.S.2d at 38-39, 518 N.E.2d at 933. The only question decided by the Court thus was whether petitioner was required to apply to the Appellate Division for disclosure of jurors' names and home addresses; the Court offered no view whatsoever whether petitioner should be permitted access to such names and addresses under the First Amendment, or otherwise.

The restricted nature of the Court of Appeals' ruling is not altered by footnote 4 of its opinion, rejecting petitioner's claim that it is entitled to disclosure of jurors' names and home addresses pursuant to the First Amendment right of access to criminal proceedings. At most, this was a rejection of the claim that petitioner has a First Amendment right to *unrestricted* access to juror information—an argument that petitioner does not advance in support of its petition for a writ of certiorari. See Petition, at 18 (acknowledging that the claimed First Amendment right of access to jurors' names and home addresses is a qualified right). Given the Court of Appeals' statement that the only issue it was determining was whether the section 509(a) procedure must be used to obtain disclosure of jurors' names and home addresses, it is clear that the Court held only that any First Amendment balancing test for access to such information may be applied by the Appellate Division when an appropriate request is made to that body pursuant to section 509(a).

Thus, contrary to petitioner's contention, the Court of Appeals has not precluded petitioner from asserting any claimed First Amendment right of access to jurors' names and home addresses; it merely has held that under section 509(a), it is for the Appellate Division to pass on any such claim. Unless and until the Appellate Division rejects an application for disclosure of jurors' names and home addresses pursuant to that section, petitioner's assertion that its constitutional right of access has

been denied is premature. This Court accordingly should deny the petition for a writ of certiorari, on the ground that no constitutional issue is presented by the Court of Appeals' holding that petitioner is required to comply with the procedure provided by New York law for obtaining access to juror information.

II.

THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS TO THE NAMES AND HOME ADDRESSES OF JURORS. IN ANY EVENT, ANY SUCH RIGHT OF ACCESS IS SUBJECT TO REASONABLE RESTRICTIONS, SUCH AS THOSE IMPOSED BY SECTION 509(a) OF THE NEW YORK JUDICIARY LAW.

Even if the Court of Appeals' decision somehow can be read as having determined the merits of petitioner's First Amendment claim, the petition for certiorari should not be granted because there is no First Amendment right to the names and home addresses of jurors and because any such right is subject to reasonable regulation.

A. There Is No First Amendment Right Of Access To Jurors' Names And Home Addresses

The Supreme Court cases recognizing a First Amendment right of access all have dealt with actual physical access to court proceedings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (access to criminal trial); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right to attend juror voir dire); *Press-Enterprise Co. v. Superior Court*, ____ U.S. ____, 106 S. Ct. 2735 (1986) (access to preliminary hearing). See also *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984) (First Amendment right of access is limited to physical presence at trial). Accord *United States v. Beckham*, 789 F.2d 401, 406-409 (6th Cir. 1986); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983), cert. denied, 461 U.S. 931 (1983).

Although some federal courts have extended the reasoning of the Supreme Court cases on access to court proceedings to find a right of access to various documents filed with the court in connection with a judicial proceeding, no federal Court of Appeals has held that the First Amendment right of access to criminal proceedings requires disclosure of jurors' names and home addresses.³ The only circuit court that has directly addressed the constitutional issue has concluded that there is no such right of access to jurors' names and home addresses. Thus, in *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), the Fifth Circuit held that the trial judge properly followed "a well-established practice" by refusing to allow public disclosure of a jury list that included jurors' names and addresses. 558 F.2d at 1210, n. 12. Just last year, in *United States v. Edwards*, 823 F.2d 111, 120 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1109 (1988), the Fifth Circuit reaffirmed the trial court's right to withhold the release of jurors' names, noting that no Supreme Court case since 1977 had overruled its holding in *Gurney*.

While petitioner asserts that juror interviews made possible by media access to jurors' names and home addresses have become an integral part of media coverage of a criminal trial (Petition, at 10-11), the courts have rejected attempts to parlay the First Amendment right of access to criminal trials into a generalized right to gather information. In *Radio & Television News Ass'n v. U.S. District Court*, 781 F.2d 1443 (9th Cir. 1986), petitioner claimed that the district court's order prohibiting trial counsel from communicating with the media violated petition-

3 Contrary to the suggestion at page 9 of the Petition, the Fourth Circuit's decision in *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988), finding a right of access to jurors' names and home addresses, was not based on the First Amendment. 841 F.2d at 75-76, n. 4. Although the District Court of Massachusetts held in *United States v. Doherty*, 14 Media L. Rep. (BNA) 1406 (D. Mass. 1987), that there is a First Amendment right to the names and addresses of jurors at some reasonable time after a verdict is delivered, it stressed that this right is qualified and is subject to time and scope limitations. 14 Media L. Rep. at 1409-1410.

er's First Amendment rights. The Ninth Circuit rejected this argument, saying:

[T]he impact on the media in this case is significantly different from situations where the media is denied access to a criminal trial or is restricted in disseminating any information it obtains.

* * *

[Petitioner] asserts a first amendment right of full access to trial participants. This assertion is not supported by constitutional case law.

The press does enjoy a constitutional interest in access to our criminal courts and criminal justice process. In *Richmond Newspapers*, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827, 65 L.Ed.2d 973 (1980) (plurality) the Supreme Court affirmed the first amendment "right of access" or "right to gather information" granted to the press with respect to criminal trials. However, the Court described that right only as a right to sit, listen, watch, and report.

* * *

The media never has any guarantee of or "right" to interview counsel in a criminal trial. Trial counsel are, of course, free to refuse interviews, whether or not restrained by court order. If such an individual refuses an interview, the media has no recourse to relief based upon the first amendment.

781 F.2d at 1446-1447 (citations omitted). In *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 256, 678 P.2d 431, 441 (Ariz. 1984), the Arizona Supreme Court similarly held that the policies underlying the right of access to criminal trials do not guarantee the media access to trial participants.

The caselaw does not support petitioner's assertion that it has a constitutional right to disclosure of jurors' names and home addresses. Thus, even assuming that the Court of Appeals decided the constitutional issue adversely to petitioner, there is no

split of opinion among the circuit courts warranting review by this Court.

B. Any First Amendment Right Of Access To Jurors' Names And Home Addresses Is Subject To Reasonable Regulation

Assuming, for the sake of argument, that there is a First Amendment right of access to jurors' names and home addresses, any such right nevertheless is subject to reasonable regulation. Because section 509(a) of the New York Judiciary Law merely regulates the manner in which juror information is disclosed, and does not deny access to such information, it does not run afoul of the First Amendment.

The Supreme Court cases recognizing a constitutional right of access to criminal proceedings have acknowledged that limitations on the right of access that resemble "time, place and manner" restrictions on protected speech need not be justified by the compelling governmental interest necessary⁴ to support an outright denial of access. See *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 511, n. 10 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, n. 17 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581-582, n. 18 (plurality opinion); *id.* at 598, n. 23 (Brennan, J., concurring); *id.* at 600 (Stewart, J., concurring). See also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (because right to pretrial discovery is a matter of legislative grace, State discovery rules providing for protective orders require no heightened First Amendment scrutiny).

Where neither the purpose of a limitation on access nor its effect primarily is to deny access to information, the relevant standard for judging the constitutionality of such limitation is whether the restrictions imposed are reasonable and whether the State's interests override the limited incidental effects on First Amendment rights. See *United States v. Kerley*, 753 F.2d

4 Although not subject to this standard, it is significant that the New York courts have found that compelling policy considerations underlie section 509(a). See *Newsday, Inc. v. Sise*, 120 A.D.2d at 13, 507 N.Y.S.2d at 184-185; 71 N.Y.2d at 151, 524 N.Y.S.2d at 38, 518 N.E.2d at 932.

617, 620-621 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983); *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 256, 678 P.2d 431, 441 (Ariz. 1984). Under this standard, section 509(a), which simply provides that an application for disclosure of juror information must be made to the Appellate Division, clearly passes constitutional muster. There accordingly is no reason to grant certiorari to review the constitutionality of section 509(a).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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